



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 38 OF 2018

(FORMERLY CMCC EMBU NO. 92 OF 2017)

FREDRICK MUKIRI KINGATIA.....PLAINTIFF

VERSUS

JOHN NJIRU.....1ST DEFENDANT

NEWTON KURIA.....2ND DEFENDANT

JAMES NJERU.....3RD DEFENDANT

JUDGEMENT

1. By a plaint dated 15th March 2005, the Plaintiff sought the following orders against the Defendants:

- a. *Eviction from parcel of land No. Ngandori/Kirigi/2012.*
- b. *General damages for loss of user of land.*
- c. *Costs of this suit.*
- d. *Interest on (c) at court rates.*
- e. *Any further relief this honourable court may deem fit to grant.*

2. The Plaintiff pleaded that the Defendants had trespassed into his *Title No. Ngandori/Kirigi/2012* (hereafter *the suit property*) without lawful cause or excuse. It was further pleaded that despite demand and notice to sue issued, the Defendants had failed to vacate the suit property hence the suit.

3. By a written statement of defence dated 28th April 2005, the Defendants denied the Plaintiff's claim in its entirety. They denied trespassing into the suit property and stated that it was the Plaintiff who had allowed them and their late mother to reside thereon in 1972. They further pleaded that they had developed the suit property and buried their late mother thereon.

4. The Defendants amended their defence on 27th February 2019 to introduce a counterclaim for adverse possession against the Plaintiff. They contended that they had been in occupation of the suit property peacefully for a period exceeding 12 years hence they had acquired title thereto on account of adverse possession.

5. The Defendants further pleaded that they were not party to *Embu Land Tribunal Case No. 20 of 2002 – Fredrick Mukiri Kingatia Vs Nyaga Kabutu and Embu SPMCC Tribunal Case No. 3 of 2003* by which the Plaintiff acquired title to the suit property. They therefore sought the following prayers in the counterclaim:

- a) *A declaration that the Defendants have acquired title to the suit land by way of adverse possession and are thus entitled to be registered as proprietors thereof.*
- b) *A declaration that the Tribunal's decision in Embu District Tribunal Case No. 20 of 2002 is null and void for contravening clear*

legal provisions.

c) Costs of the suit and counter-claim.

6. By a defence to counterclaim dated 23rd March 2019, the Plaintiff refuted the Defendants' counterclaim for adverse possession. It was pleaded that the initial occupation by the Defendants was with his consent which terminated on 13th January 2003 upon determination of *Embu SPMCC Tribunal Case No. 3 of 2003*. He further stated that the Defendants had previously made their claim through their father Nyaga Kabutu in *Embu LDT Case No. 20 of 2002* and lost.

7. At the trial hereof, the Plaintiff testified on his behalf as the sole witness. He adopted his witness statement dated 2nd March 2015 as his sworn testimony and produced the documents in his list of documents as exhibits. He stated that although the suit property was initially registered in the name of the Defendants' late father, Nyaga Kabutu, he obtained title thereto through *Embu LDT Case No. 20 of 2002*.

8. The 2nd Defendant, Newton Kuria, testified at the trial on his own behalf and on behalf of his co-defendants. He adopted his witness statement dated 25th April 2017 as his sworn testimony and produced a copy of the greencard for the suit property as an exhibit. He conceded that the Defendants entered the suit property in 1972 with the consent of the Plaintiff, who was their uncle. He stated that it was the Plaintiff who showed them where to build their houses.

9. When questioned by the court on the status of the suit property, the 2nd Defendant stated that the Plaintiff was occupying about one and half acres whilst the Defendants occupied one and half acres. He stated that the Plaintiff was living on one half of the suit property and that he had been in occupation since the 1960s. The Plaintiff was apparently in occupation by the time he allowed the Defendants and their parents to join him. It was the Plaintiff who showed them where to build and where to cultivate.

10. Upon conclusion of the hearing on 1st July 2019 the Plaintiff was granted 30 days within which to file and serve his written submissions whereas the Defendants were granted 30 days upon the lapse of the Plaintiff's period to file their submissions. The record shows that the Plaintiff filed his written submissions on 7th October 2019. The Defendants submissions were not on record by the time of preparation of the judgement.

11. The court has noted from the record that the parties did not file an agreed statement of issues. The court shall therefore proceed to frame the issues for determination as provided for by law. Under **Order 15 Rule 2** of the **Civil Procedure Rules**, the court may frame issues from any of the following:

- a) The allegations contained in the pleadings.
- b) The statements made on oath by or on behalf of the parties.
- c) The contents of documents produced by the parties.

12. The court has considered the pleadings, documents and evidence on record in this matter. The court is of the opinion that the following matters arise for determination in this matter:

- a) *Whether the Defendants are trespassers on the suit property.*
- b) *Whether the Defendants have demonstrated their claim for adverse possession.*
- c) *Whether the decision of the Tribunal in Embu LDT No. 20 of 2002 was null and void.*
- d) *Whether the Plaintiff is entitled to the reliefs sought in the plaint.*
- e) *Whether the Defendants are entitled to the reliefs sought in the counterclaim.*
- f) *Who shall bear the costs of the suit.*

13. The court has considered the entire evidence on record on the 1st issue. There is no doubt that the Plaintiff is the current registered proprietor of the suit property. He produced a copy of a certificate of official search and a title deed to demonstrate his ownership. The Defendants also produced a copy of the land register for the suit property which showed that the Plaintiff was registered as proprietor on 11th December 2003.

14. The Defendants' defence to the action was twofold. First, that they entered the suit property in 1972 with the permission of the Plaintiff who showed them where to build and where to cultivate. Second, that they had acquired title to the suit property through adverse possession. The issue of adverse possession has been framed as a separate issue hence it shall be dealt with later on. Although consent or permission of the owner can be a defence to an action for trespass, it must be remembered that permission can be terminated at the will of the owner. The court does not agree with the view taken by the Defendants that since permission was granted in 1972 then it can never be terminated afterwards. In any event, the Plaintiff was not the registered proprietor of the suit property in 1972.

15. Whichever way one looks at the matter, it is clear that the Plaintiff's permission was withdrawn when he took legal action in *Embu LDT*

No. 20 of 2002 against the Defendants' father (who was then the registered proprietor) so that he could be registered as proprietor. It would appear that the Plaintiff succeeded in that action hence the award of the Tribunal was adopted as a decree of the court in *Embu SPMCC Tribunal Case No. 3 of 2003*. The filing of the instant suit is a testimony that the Defendants' licence to remain on the suit property had been terminated.

16. According to **Black's Law Dictionary** (9th Edition) trespass is defined as:

- a) *An unlawful act committed against the person or property of another.*
- b) *A legal action for injuries from an unlawful act of any kind.*

17. **Black's Law Dictionary** (supra) also makes reference to **R.F.V. Henston, Salmond on the Law of Torts (17th edition)**, and quotes the following passage;

“The term trespass has been used by lawyers and laymen in three senses of varying degrees of generality. (1) In its widest and original signification it includes any wrongful act – any infringement or transgression of the rule of right. The use is common in the Authorised Version of the Bible, and was presumably familiar when the version was first published. But it never obtained recognition in the technical language of the law, and is now archaic even in popular speech. (2) In a second and narrower signification – It's true legal sense – the term means any legal wrong for which the appropriate remedy was a writ of trespass – viz any direct and forcible injury to person, land, or chattels. (3) The third and narrowest meaning of the term is that in which, in accordance with popular speech, it is limited to one particular kind of trespass in the second sense – viz the tort of trespass to land (*trespass quare clausum fregit*). (Emphasis added)

18. The court is thus of the opinion that the Plaintiff has demonstrated an interference with his proprietary rights with respect to the suit property. Under **Section 24 of the Land Registration Act, 2012**, the registration of a person shall vest in him absolute ownership of the land in question together with all rights and privileges belonging or appurtenant thereto. Those rights are not to be altered or defeated except as may be provided for by law.

19. The 2nd issue is whether the Defendants have demonstrated their claim for adverse possession. The requirements for proving adverse possession were restated in the following cases: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

20. In the case of **Kasuve Vs Mwaani Investment Ltd** (supra) the elements of adverse possession were summarized as follows;

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

21. The court has considered the pleadings, document and evidence of the parties on the 2nd issue. There is no doubt that the Defendants have been in possession of the suit property since 1972 or thereabouts. There is no doubt that they have built some houses thereon and that they have cultivated crops thereon over the years. There are, however, two questions which come to mind with respect to the elements for adverse possession. First, when the period of limitation started running against the Plaintiff. Second, whether the Defendants' possession and occupation was hostile or with the permission of the owner.

22. The copy of the land register produced by the Defendants indicate that the Plaintiff was registered as proprietor of the suit property on 11th December 2003. Prior to that registration, it was the Defendants' father, Nyaga Kabutu, who was the registered proprietor between 3rd November 1965 and 10th December 2003. The material on record indicates that the Plaintiff filed suit on 22nd March 2005 to assert his property rights. As was held in the case of **Githu V Ndeete (supra)** time stops running for purposes of limitation of actions once the proprietor takes legal proceedings for recovery of his land. It was not demonstrated by the Defendants that time could have run against their own father who was registered as proprietor in 1965. The Defendants must have entered the suit property with the blessings of their father. The court is of the opinion that the Defendants were simply living there as family members hence time could not run against their own father.

23. The court is thus of the opinion that time for purposes of limitation of actions only started running on 11th December 2003 when their father ceased being the registered owner of the suit property. The court is further of the opinion that time continued running against the Plaintiff until 22nd March 2005 when the Plaintiff asserted his property rights by filing the instant suit for eviction. The effective period for purposes of limitation was therefore a period of about one year and 3 months only which falls short of the statutory minimum of 12 years.

24. The 3rd issue is whether the decision of the Tribunal in *Embu LDT No. 20 of 2002* was null and void. The Defendants contended that the award of the Tribunal was a nullity because it lacked jurisdiction to entertain the claim. It was also contended that the Defendants were not parties to those proceedings hence the award was not binding upon them. The court has considered the material on record and the submissions on record on this issue. The material on record indicates that the Plaintiff was seeking to reclaim the suit property from the Defendants' father who was then the registered proprietor. The Defendants were not the registered owners of the suit property hence could not be joined in those proceedings.

25. The court has further noted that the award of the Tribunal was never challenged by any of the concerned parties, that is, the Plaintiff herein and the Defendants' father, Nyaga Kabutu. It is doubtful if the Defendants can competently challenge that award after the passage of 17 years without a grant of letters of administration to the estate of their late father. Be that as it may, the court is persuaded by the Court of

Appeal decision in **Florence Nyaboke V Mogere Amosi Ombui & 2 Others [2014] eKLR** that since the Tribunal's award was never challenged in the manner prescribed by law, and it was consequently adopted as a decree of the court it remains a valid decision. It was acted upon and perfected in 2003 hence cannot be challenged through the back door.

26. The 4th issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has found that the Plaintiff has proved his case of trespass against the Defendants. The court has also found that the Defendants have not demonstrated any lawful justification or excuse for their occupation of the suit property. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the plaint save as may be qualified hereafter.

27. The court has noted that the Plaintiff sought general damages for "loss of user" of the suit property. The court is of the opinion that damages for loss of user are in the nature of special damages. The claimant must plead specific particulars of such loss, including the rate at which the damages are sought and period of time for which they are sought. The Plaintiff did not plead the claim with particularity and no evidence was led at the trial to justify an award for loss of user.

28. The 5th issue is whether the Defendants are entitled to the reliefs sought in the counterclaim. The court has found that the Defendants have failed to demonstrate their claim for adverse possession against the Plaintiff. The court has also held that the award of the Tribunal and the consequent decree were valid since they were never challenged in the manner prescribed by law. It would, therefore, follow that the Defendants are not entitled to the reliefs sought in the counterclaim.

29. The 6th and final issue is on costs of the suit and counterclaim. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is aware that the parties herein are close relatives. Accordingly, the order which commends itself to the court is that each party shall bear his own costs.

30. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his case on a balance of probabilities whereas the Defendants have failed to prove their counterclaim as required by law. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:

- a) Judgement be and is hereby entered for the Plaintiff against the Defendants in terms of paragraph 9(a) of the plaint dated 15th March 2005.*
- b) The Plaintiff's claim for general damages for loss of user of land is hereby declined.*
- c) The Defendants' counterclaim is hereby dismissed in its entirety.*
- d) Each party shall bear his own costs of the suit and counterclaim.*

31. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 14TH DAY of NOVEMBER, 2019.

Mr. Manyara holding brief for Mr. Kathungu for the Plaintiff and Mr. Morris Njagi holding brief for Mr. Andande for the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

14.11.19